IN THE

Supreme Court of the United States

October Term, 1975

No. 75-537

TOUCHE ROSS & CO., *et al.*,
Petitioners,

vs.

MICHAEL FABRIKANT and MILTON BINSWANGER, JR.,
Respondents.

TOUCHE ROSS & CO., *et al.*,
Petitioners,

vs.

PENN MART REALTY CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 5, 1975.

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Respondents respectfully pray that a writ of certiorari not issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered in these proceedings on May 19, 1975, which properly dismissed Petitioners' appeal, taken pursuant to 28 U.S.C. § 1291, from the class action certification order entered by the United States District Court for the Southern District of California. This dismissal was required by well settled principles of law which have been established by this Court and are consistently followed by all the Circuit Courts.

Question Presented

Does an appeal lie under 28 U.S.C. § 1291[1] challenging the propriety of a trial judge's interlocutory order, issued in the exercise of discretion, which found that the requirements of F.R. Civ. P. Rule 23(b)(3)[2] had been met;

[1] 28 U.S.C. § 1291 provides:

"FINAL DECISIONS OF DISTRICT COURTS—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[2] F.R. Civ. P. 23 provides, in relevant part:

"RULE 23. CLASS ACTIONS—(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

where appellant has not demonstrated irreparable harm; where the order will not materially alter the manner in which the action will proceed; and where the order can be fully and effectively reviewed after final judgment?

Statement of the Case

These cases[3] were precipitated when the Securities and Exchange Commission suspended trading in the securities of U.S. Financial Incorporated ("USF") on December 5, 1972, and sought sanctions against various persons in connection therewith. Subsequently, Touche Ross & Co. ("Touche"—USF's auditors and one of the Petitioners herein) withdrew its certification of USF's 1970 and 1971 financial statements. USF petitioned for an arrangement under Chapter XI of the Bankruptcy Act, and is presently seeking reorganization under Chapter X of the Bankruptcy Act. USF has admitted that the reports sued upon were fraudulent. Indictments were handed down and several defendants in this action have pleaded guilty to them.[4] The Securities and Exchange Commission ("SEC") commenced a civil action against many of the defendants in this action. Additionally, the SEC and Touche entered into a Consent Order, based upon the SEC's conclusion that Touche engaged in improper professional conduct, that Touche be censured by the Commission and that, among other things, Touche not accept any new professional engagement for a client in the real estate business until taking various steps to improve its audit procedures, among other things, to the satisfaction of the chief accountant of

[3] *Fabrikant, et al.* v. *Stewart, et al.*, Nos. 74-282-T and 74-283-T (S.D. Cal.) (hereinafter referred to collectively as *"Fabrikant"*); *Penn Mart Realty Co.* v. *U.S. Financial Incorporated, et al.*, No. 74-281-T (S.D. Cal.) (hereinafter referred to as *Penn Mart*).

[4] *U.S.A.* v. *Walter, et al.*, U.S. District Court, S. D. Cal., Index #74-2474.

the SEC. *Touche Ross & Company, Accounting Series Release No. 153*; Securities Act Release No. 5459; Securities Exchange Act Release No. 10654. February 25, 1974, 39 F.R. —. CCH Fed. Sec. L. Rep. Vol. 5, ¶ 72,195, pp. 62,399 and 62,400.

Numerous substantial private litigations have been commenced against essentially the same defendants upon basically the same facts. Those actions were consolidated by the Judicial Panel on Multidistrict Litigation under the caption, *In Re U.S. Financial Securities Litigation,* MDL 161, and are being litigated in coordinated fashion, together with *Fabrikant* and *Penn Mart,* which were also consolidated therein.

The complaint in *Fabrikant* is brought by two individuals who purchased $60,000 of USF 5½% Convertible Subordinated Debentures on behalf of themselves and all persons who purchased said Debentures. $35 million of these Debentures were issued to the public on April 1, 1971 pursuant to a prospectus which, among other things, contained USF's certified financial statements for the year ending December 31, 1970. The *Fabrikant* class period is from April 1, 1971 to December 5, 1972, when there was a trading halt in the Debentures.

The complaint in *Penn Mart* is brought by a corporate purchaser of USF common stock on its own behalf and on behalf of all persons who purchased common stock of USF during the period from January 1, 1970 through December 5, 1972.

The wrongs alleged in *Penn Mart* cover the period from January 1, 1970 through December 5, 1972.[5]

[5] The SEC findings state "Information furnished to the Commision . . . indicated that financial reports issued by USF and filed with the Commission including the annual financial statements for the years ended 1970 and 1971 were false and misleading" *Touche Ross & Company, Accounting Series Release No. 153, supra,* at page 62,393. These are the statements at the heart of the *Fabrikant* and *Penn Mart* complaints.

The United States Attorney for the San Diego District has investigated certain transactions behind the allegations and the conclusions of the attorney in charge of that investigation are quoted in the District Court opinion granting the class motion (A5-6).[6] Those conclusions and the record indicate that during that period, USF engaged in a series of related real estate transactions, the financial results of which were improperly reported in its financial statements, its annual reports, and in a prospectus dated April 1, 1971. The fraudulent reports enabled USF to raise $35 million from the public and caused members of the public to pay inflated prices for tens of millions of dollars of already issued securities.

Both *Fabrikant* and *Penn Mart* allege violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Additionally, *Fabrikant* alleges violations of Section 11 of the Securities Act of 1933. The evidence necessary to prove liability of the defendants in all of the MDL 161 cases, private and class, will be nearly indentical.

The complaints in the *Fabrikant* and *Penn Mart* class actions are similar in all essential respects to several of the private actions in MDL 161. There is substantial identity of defendants in these class actions and several of the private actions. The losses of plaintiffs in the private actions are in excess of $20 million. It is certain that MDL 161 will continue with or without these class actions. Indeed most of the private actions are brought by the larger purchasers of the debentures and common stock covered by the *Fabrikant* and *Penn Mart* classes.

Discovery in MDL 161 is being conducted by a court-appointed Plaintiffs' Steering Committee, in order to further the Multidistrict Panel's purpose of streamlining this

[6] References are to the Appendix to the Petition for a Writ of Certiorari.

litigation for judicial economy and saving of expense to all parties, particularly the defendants. Plaintiffs' counsel in the *Fabrikant* action has been designated by the trial court as liaison counsel for all plaintiffs. The defendants are not being put to any additional effort by the pendency of these actions.

The five efforts of the Petitioners[7] to review the interlocutory class order herein have required plaintiffs' counsel to expend many hundreds of hours on research, briefing and oral argument which would otherwise have been directed toward pretrial discovery and trial preparation. The added burden upon the courts is also proportionately increased by efforts to review an order which is not final.

REASONS FOR DENYING THE WRIT

1. The Decision Dismissing the § 1291 Appeal is in Complete Harmony With *Eisen IV*, Which Reaffirmed the Settled Rule That Exceptional Circumstances Are Required to Justify Departure From the Final Judgment Rule.

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974) (*Eisen IV*), fails to support Petitioners' extraordinary suggestion that an "order certifying a class action is appealable as a matter of right, pursuant to 28 U.S.C. § 1291, at least in complex securities law cases." (Petition, pp. 15-16).

[7] Petitioners' four prior efforts were: (1) An application for certification pursuant to 28 U.S.C. § 1292(b), in which petitioners properly characterized the order as interlocutory. After extensive briefing and oral argument, the application was denied; (2) A petition for mandamus or prohibition requiring the District Court to grant Section 1292(b) certification, which was denied by the Ninth Circuit; (3) An appeal pursuant to 28 U.S.C. § 1291, which was dismissed by the Ninth Circuit in the same order denying mandamus, and as to which petitioners now seek certiorari; and (4) A petition for rehearing and suggestion for rehearing in banc, which was denied, no judge having requested a vote thereon.

This Court in *Eisen IV* stated:

> "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." 417 U.S. at 170, 94 S.Ct. at 2149.

The Circuit Courts which have since considered the question have held that such right of appeal would be contrary to the Final Judgment Rule. *Handwerger* v. *Ginsberg*, —— F.2d ——, CCH Fed. Sec. L. Rep. ¶ 95,241 (2d Cir. July 16, 1975); *Parkinson* v. *April Industries, Inc.*, ——F.2d ——, CCH Fed. Sec. L. Rep. ¶ 95,277 (2d Cir. June 30, 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); White Industries, *Inc.* v. *Cessna Aircraft Co.*, 518 F.2d 213 (8th Cir. June 23, 1974); *Blackie* v. *Barrack*, —— F.2d ——, CCH Fed. Sec. L. Rep. ¶ 95,312 (9th Cir. September 25, 1975); *Seiffer* v. *Topsy's International, Inc.*, 520 F.2d 795 (10th Cir. July 28, 1975). Such uniform interpretation of settled law does not call for review by this Court.

The Final Judgment Rule, 28 U.S.C. § 1291, has been consistently recognized as a keystone to the efficient and just administration of the federal judicial system. *Catlin* v. *United States*, 324 U.S. 299 (1945); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Parkinson* v. *April Industries, Inc., supra.* The rule avoids

> ". . . the destruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leadenfooted". *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940).

Mr. Justice Frankfurter's stated reasons in 1940 for honoring the Final Judgment Rule are even more imperative today, and are peculiarly applicable to Petitioners' fifth effort to obtain review herein.

Because of its importance to proper judicial administration, this Court has recognized that departure from the Final Judgment Rule would only be justified in a narrow category of cases where the order appealed from (1) is separable from and collateral to the claims asserted in this action; (2) would finally determine the collateral question; and (3) would result in irreparable harm by any delay in appeal. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 651, 69 S. Ct. 1221, 93 L.Ed. 1928 (1949); *Eisen IV, supra.*

Orders pursuant to F.R. Civ. P. 23 granting class status are not generally susceptible to exception from the Final Judgment Rule by virtue of the *Cohen* doctrine. They are peculiarly interlocutory in nature.

"The granting of a class designation is in no sense an effective termination of any aspect whatever of the litigation, but only directs the form in which the action will proceed. The initial order is strictly provisional and by the terms of Rule 23(c)(1) 'may be altered or amended before the decision on the merits.' An order granted prior to discovery may be reevaluated on the basis of facts emerging from a fuller record, and a decision by an appellate court upon an appeal from the initial order would not settle the propriety of the designation once and for all because new information might well require a revision of the original order by the district court. The possible likelihood of successive appeals on the same issue, a concern which lies at the heart of the final judgment rule, exists. See Weight Watchers of

Philadelphia, Inc. v. Weight Watchers, International, Inc., supra; Note, 42 Geo. Wash. L. Rev. 621 (1974)." *Parkinson* v. *April Industries, Inc.*, — F.2d —, CCH Fed. Sec. L. Rep. ¶ 95,227, p. 98,192.

Class orders are not separable from the merits, because determination of issues such as existence and predominance of common questions of fact and law and adequacy of class representation are mandated by F.R. Civ. P. 23. See discussion in Point 2.

Accordingly, even prior to *Eisen IV,* the Courts of Appeals almost uniformly rejected § 1291 appeals from class determination.[8]

This Court's decision in *Eisen IV* was a reaffirmation of the exceptional circumstances required to invoke the collateral order doctrine, and accordingly only considered the question of costs and the manner of giving notice which were within the *Cohen* collateral order doctrine.[9] No such collateral issues are found in the order from which appeal is sought here.

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[8] The only exception was *Herbst* v. *International Telephone & Telegraph Company,* 495 F.2d 1308 (2d Cir. 1974) where two of the three concurring judges issued separate opinions expressing grave doubts as to the propriety of accepting a § 1291 appeal from a determination granting class status, and concurred primarily because *Eisen IV,* which was then pending before this Court, had not yet been decided. Subsequent decisions of the Second Circuit have in effect overruled *Herbst,* noting that a similar appeal would not be permitted today on the same issues. *Parkinson* v. *April Industries, Inc., supra,* at p. 98,196, fn. 9.

Jurisdiction of *Eisen III,* 479 F.2d 1005 (2d Cir. 1973), was accepted by the Second Circuit because it had retained jurisdiction over the remand of *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555 (2d Cir. 1968) (*Eisen II*). Its dicta at 479 F.2d 1007, fn. 1, with respect to § 1291 has in effect been overruled by *Parkinson* v. *April Industries, Inc., supra.*

2. The Instant Class Order Would Not be Appealable as a Final Order in Any Circuit. Therefore, There is No Controversy for This Court to Now Consider.

The suggestion that there is a conflict among the Circuits on the § 1291 appealability of class orders is mistaken. The further suggestion that any alleged conflict could have changed the outcome of this appeal is even further astray, for as demonstrated in Point I, the circuits have uniformly rejected jurisdiction of such appeals. In an attempt to manufacture a controversy ripe for consideration by this Tribunal, the Petitioners cite certain decisions of the Second Circuit which they allege are in conflict with certain Ninth Circuit decisions. *General Motors, supra; Blackie* v. *Barrack, supra.* Respondents deny any conflict, *infra.* However, even if such conflict exists, it would be irrelevant in this case, for the District Court's order was not appealable under either the three-prong test, *General Motors, supra,* or the *Blackie* decision, both of which permit appeal only upon satisfying the *Cohen* requirements which include a collateral order separable from the merits.

Moreover, *Blackie's* prohibition of appeals from class determinations and the three-prong "reverse death knell" test equally bar the appeal, as does the requirement of irreparable harm. *Cohen, supra; Eisen IV, supra.* Petitioners' recognition that their appeal would not lie under

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[9] See *Eisen IV, supra,* 417 U.S. at 172, 94 S.Ct. at 2150, fn. 10 where Mr. Justice Powell stated:

> ". . . we find the notice requirements of Rule 23 to be dispositive of petitioner's attempt to maintain the class action as presently defined. We, therefore, have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction."

any of the tests which they describe [10] accounts for their use of the conflict argument merely as a pretext to advance an entirely new position, unsupported by any case law, that there should be an absolute right of appeal from any order granting a class, at least in complex securities actions.

In adhering to the *Cohen* doctrine requirement of separability, the Circuit decisions considering the appealability of an order granting a class [11] uniformly have held that a discretionary order pursuant to F.R.Civ.P. 23(b)(3) is not separable from or collateral to the merits, because inherent in such a decision is a determination with respect to the existence and predominance of common questions, plaintiff's adequacy as a representative of the class, and the like. Regardless of whether the courts used the so-called three-prong test, the rationale given by each court was the same on this requirement, and each of the decisions has determined that such lack of separability requires dismissal of any § 1291 appeal from a class order. *Parkinson* v. *April Industries, Inc., supra,* — F.2d —, CCH Fed. Sec. L. Rep. ¶ 95,227 at p. 98,195 (2d Cir.); *Walsh* v. *City of Detroit,* 412 F.2d 226, 227 (6th Cir. 1969); *White Industries, Inc.* v. *Cessna Aircraft Co.,* 518 F.2d 213, 216 (8th Cir. 1975); *Blackie* v. *Barrack, supra* (9th Cir.); *Seiffer*

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[10] Petitioners' suggestion (Petition, p. 18) that the Ninth Circuit's citation of *General Motors* v. *City of New York, supra,* as authority for dismissal of the instant appeal indicates use of the three-prong standard, and Petitioners' suggestion (Petition, p. 19) that this test is more receptive to § 1291 appeal than *Blackie,* is a virtual admission that their appeal would not lie in either of the Circuits.

[11] In contrast to such collateral questions as allocation of cost and form of notice, *Eisen IV.*

v. *Topsy's International, Inc.*, 520 F.2d 795, 798 (10th Cir. 1975).[12]

Petitioners concede that "[s]trict application of the requirement that the order be 'separable from the merits' [which is required by *Cohen*] has virtually precluded any review of a district court's determination under Rule 23 that common questions predominate or that a class action is superior to other available methods of adjudication." (Petition, p. 19) Because all the Circuits considering the appealability of orders granting class status have taken a common stand on that crucial point, it is difficult to see where any conflict arises.[13]

Recognizing this, the Second Circuit, in *Parkinson* v. *April Industries, Inc., supra,* at p. 98,196, recently reaffirmed the general non-appealability under § 1291 of orders such as that involved here, stating:

[12] *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F.2d 14 (7th Cir. 1972) also rejects § 1291 jurisdiction where there is no separability. In fact, appellants there conceded that the class order was not by itself appealable as a final order, and requested jurisdiction pendent to another issue.

[13] However, conflict does appear in the position taken by one of the Petitioners herein. Touche Ross & Co. in its petition herein (page 20-21) urges that neither the three-prong test nor any other test which the various courts have applied to conform with *Cohen* should be adopted by this Court. It has used this point of alleged conflict to urge that some other standard, direct right of appeal, be adopted, a position not supported by any circuit court decision or decision of this Court. In another petition for a Writ of Certiorari pending before this Court (*Touche Ross & Co.* v. *Robert Seiffer et al.,* Docket #75-574), Touche Ross contends that the "three-prong test" was, in fact, the proper application of *Cohen* v. *Beneficial Indus. Loan Corp.*

> "Our court in General Motors recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met."

There is no reason to believe that any court interprets *Cohen, Eisen IV* or *General Motors* differently from the *Parkinson* Court, as all of them have uniformly rejected appeals from orders granting class status pursuant to F.R. Civ. P. 23(b)(3).[14]

Accordingly, there is no conflict among the Circuits as to the appealability pursuant to § 1291 of a trial judge's discretionary ruling that a class action meets the requirements of F.R. Civ. P. 23(b)(3).

[14] It appears that the *Blackie* opinion was written without benefit of the *Parkinson* clarification of the Second Circuit's position. *Blackie* was fully briefed and argued prior to the *Parkinson* decision.

Conclusion

For the foregoing reasons, a Writ of Certiorari should not issue to review the order of the United States Court of Appeals for the Ninth Circuit.

Dated: November 5, 1975

Respectfully submitted,

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